Kioko & another v Republic (Criminal Appeal E098 & E097 of 2021 (Consolidated)) [2023] KEHC 17505 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E098 & E097 OF 2021 (CONSOLIDATED)

TM MATHEKA, J

MAY 16, 2023

AS CONSOLIDATED WITH MAKUENI HCCRA NO. E097 OF 2021

BETWEEN

ALBANUS KIOKO .... 1ST APPELLANT

MWANIKI PAUL .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence of Hon. J.N. Mwaniki (CM) in Makueni Chief Magistrate's Court Criminal Case No. E304 of 2021 delivered on 14th October 2021)

JUDGMENT

1. The appellants were jointly charged with the offence of Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the *Penal Code*. The particulars of the offence were that on July 4, 2021 at unknown time, at Kyamuthei Market, Okia Location within Makueni County, the appellants, with others not before court, broke and entered into the hotel of Joyce Mumbi by breaking the door and thereby stealing assorted properties; 3kg meat, 1 bundle of maize flour, cooking oil 10 litres, 6kg sugar, 3kg rice, 1 woofer sonitec, 2 speakers, 2 crates of eggs, 18 kgs ndengu, 1 sufuria, 1 carton of milk, 1 shoka and 2 pangas all valued at Kshs 22,580/=, the properties of the said Joyce Mumbi.
2. In the alternative the Kioko Albanus was charged with Handling stolen goods contrary to section 322(1) as read together with section 322(2) of the *Penal Code*. It was alleged that on July 4, 2021 at unknown time, at Kyamuthei Market, Okia Location within Makueni County, the 1st appellant, otherwise than in the course of stealing he dishonestly retained one (1) panga knowing it to be the stolen property stolen of Joyce Mumbi.

3. The appellants were convicted on their own pleas of guilt on the principal charge and sentenced to 5 years' imprisonment each.

The Appeal

4. Aggrieved by the conviction and sentence the appellants filed separate appeals which were consolidated. Both appellants filed similar grounds of appeal viz: 3

    a. That I pleaded guilty to the charges.

    b. That the learned trial magistrate grossly erred in law and fact by failing to draw an inference that my plea of guilty as charged could have been as a result of coercion in which the arresting officer convinced me that since I am a first offender, I should admit the charges before the court and I will be set free.

    c. That the prosecution failed to call crucial witnesses especially the informer thus rendering the conviction unsafe.

    d. That the trial court erred in law and facts by failing to consider the compelling defense of the appellant without proper evaluation.

    e. That I am remorseful and am making this appeal for leniency having learned a lesson the hard way.

    f. That I left my aged mother, my wife and my little children who were dependent on me and are now suffering since I was imprisoned and am worried about their welfare especially during this covid 19 pandemic.

    g. That I have learnt a lesson the hard way in prison custody, I have reformed and promise to lead a crime free life upon my re-integration.

    h. That I beg the court to reduce the conviction or grant a non-custodial sentence or slash the conviction or whichever the court may deem fit.

5. The 1st appellant did not file any grounds.

6. The appeal was canvassed through written submissions.

The Appellants' Submissions

7. The appellants submit that the sentence of 5 years is harsh and excessive and that they have realized that the longest journey in one's life is the journey of rediscovering themselves. That they have received constant counseling from the church and other mentors. That they have engaged in many rehabilitative programs and learnt new skills which may help them when they leave prison.

8. They have urged the court to give them a favorable sentence and to consider the following mitigation factors:

    a. They come from a very humble background.

    b. They are first offenders.

    c. They were un-armed and did not commit the offence against the complainant.

    d. They are remorseful.

e. They are well rehabilitated.

9. They have called upon this court to be guided by the Supreme Court decision in *Francis Karioko Muruatetu –vs- Republic*. They contend that they should have been sentenced to one year. It is also their submission that when the unfortunate incident happened, they were young men and they do not have previous convictions or indiscipline.

Submissions by the Respondent

10. The State, through Prosecution Counsel Vera Omollo, has relied on section 348 of the *Criminal Procedure Code* (CPC) for the submission that, appeals from subordinate courts are barred where an accused was convicted on a plea of guilty except on the extent and legality of the sentence. She has relied on the case of *George Omullo Tingia –vs- R* (2020) eKLR where the court stated:

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

11. She submits that the sentence of 5 years is lawful as the law prescribes 10 years for the offence of burglary and stealing. She relies on *Ogola S/o Owuor* 1954 21 EACA 270, *Nilsson v. Republic* 1970 EA 599 – 60-cited in *Benson Nkaramata Sakita –vs-* R (2018) eKLR where the court reiterated the principles to be considered in determining whether or not to review a sentence as follow:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established……The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic 19 EACA 147, "it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case"

12. She submits that the trial court directed itself properly in arriving at the sentence as it relied on the appellants' mitigation and probation report.

13. Having looked at the grounds of appeal, the entire record and the appellants' submissions, it is my considered view that the only issue for determination is whether the appeal has merit.

Analysis and Determination

14. The issues for determination are whether the plea was unequivocal, whether the appellants can challenge the conviction and sentence in light of s. 348 of the Criminal Procedure Code.

15. From the record, it is evident that the appellants pleaded guilty to the charges and they have admitted as much in their submissions. The record also shows that the charges and all their elements were read to them in the language which they understood (Kiswahili). They responded in Kiswahili by stating 'ni ukweli' after which the facts were read and they responded by stating 'maelezo ni ya ukweli'.

16. Section 348 of the CPC provides that:

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence."

17. However, there are numerous authorities that the wording of s. 348 is not a bar to bring an appeal even where an accused person has pleaded guilty because not all pleas of guilt are unequivocal. For instance, where an accused person pleads to a defective charge?

18. As regards the extent or legality of the sentence; In terms of pronouncement of the number of years that the appellants were going to prison that was the discretion of the learned trial magistrate.

19. The accused persons are charged with Burglary c/s 304(2) and stealing c/s 279(b) of the Penal Code.

20. Section 304 provides Housebreaking and burglary

    (1) Any person who— (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

        (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

    (2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

21. Section 279(b) states -

    279. Stealing from the person; stealing goods in transit, etc. If the theft is committed under any of the circumstances following, that is to say —

        (a) .....

        (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

22. These are two distinct charges with their own penalties. The prosecution conveniently left out the penalty under s. 279 which states the offender is liable to imprisonment for fourteen years.The question is which of the two would the learned trial magistrate use: 10 years under s. 304(2) or 14 years under s. 279(b)? The prosecution cannot literally have their cake and eat it?

23. There is no question about the fact that the charge sheet was itself fatally defective. The combination of the two charges each with its own penalty was prejudicial to the appellants who did not have the assistance of legal counsel and could not have noted that by themselves. The court cannot uphold an illegality. The fact that these two were combined like that ultimately rendered the charge fatally defective, and the guilty pleas not unequivocal.

24. S. 304 (1)(b) as read with s. (2) was sufficient to cover both the alleged burglary and theft of the complainant's property. The prosecution had the choice to use s. 304 or s. 279(b) of the Penal code.

25. At this juncture I find it necessary to reproduce our Sentencing Guidelines (2016) on the sentencing hearing as provided for at paragraph 23. In a video clip shared on our WhatsApp groups the Judge in the Nigerian Trafficking Case (citation was not available) the judge set out the factors upon which the sentence was based on setting out aggravating and mitigating factors. Our own sentencing guidelines provide us with the step by step guidelines on how to do this but still stuck in our pre-2010 Constitution practices, sentencing still remains a challenge, one liners. The guidelines make the following provisions:

    23.1 The court should schedule a hearing in which it receives submissions that would impact on the sentence. Whilst the pertinent information is typically contained in the reports, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues.

    23.2 The sentencing hearing also provides the offender with an opportunity to cross-examine on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of the *Constitution* which guarantees the offender the right to adduce and challenge evidence.

26. Determination of the Sentence

    23.3 After the sentencing hearing, the court should:

    1. Make a decision as to whether a custodial or a non-custodial sentence should be imposed in line with paragraph 7.15 of these guidelines.

    2. If the most appropriate sentence is a custodial one, proceed to determine the length of the sentence.

    Aggravating and Mitigating Circumstances

    23.4 To determine the most suitable sentence, the court shall take into account the aggravating and mitigating circumstances.

    23.5 In all cases, convicted persons should be expressly provided with an opportunity to present submissions in mitigation.

    23.6 The list of aggravating and mitigating circumstances below is not exhaustive.

    Aggravating Circumstances

    23. 7 Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence. They include:

    1. Use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability.

    2. Multiple victims.

    3. Grave impact on national security.

    4. Serious physical or psychological effect on the victim.

    5. Continued assault or repeated assaults on the same victim.

    6. Commission of the offence in a gang or group.

7. Targeting of vulnerable groups such as children, elderly persons and persons with disability.

8. Previous conviction(s), particularly where a pattern of repeat offending is disclosed.

9. Intricate planning of an offence.

10. An intention to commit a more serious offence than was actually committed.

11. High level of profit from the offence.

12. An attempt to conceal or dispose of evidence.

13. Flagrant use of violence or damage to person or property in the carrying out of an offence.

14. Abuse of a position of trust and authority.

15. Use of grossly inhuman and degrading means in the commission of an offence.

16. Targeting those working in the public sector or providing a service to the public.

17. Commission of offences motivated by ethnic, racial and gender bias.

Mitigating Circumstances

23.8 Mitigating circumstances warrant a more lenient penalty than would be ordinarily imposed in their absence. They include:

1. A great degree of provocation.

2. Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction.

3. Negligible harm or damage caused.

4. Mental illness or impaired functioning of the mind.

5. Age, where it affects the responsibility of the individual offender.

6. Playing of a minor role in the offence. 7. Being a first offender.

8. Remorsefulness.

9. Commission of a crime in response to gender-based violence.

10. Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.

23. 9 In view of aggravating and mitigating circumstances, the determination of the term of the custodial sentence shall be as follows:

   1. Starting point in determining the term of the custodial sentence: The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.

2. Presence of mitigating circumstances: The effect of mitigating circumstances/factors is to lessen the term of the custodial sentence. The court shall consider the mitigating circumstances/factors and deduct some time off the fifty percent of the custodial sentence provided by statute for that particular offence. Where the statute has set out a minimum term, the deduction of time in custody cannot go below the minimum sentence.

3. Presence of aggravating circumstances: The effect of aggravating circumstances/ factors is to increase the term of the custodial sentence. The court shall consider the aggravating circumstances/factors and add a length of time to the fifty percent of the sentence provided by statute for that particular offence. The court cannot impose a sentence that goes beyond the custodial term provided by law.

4. Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.

23.10 10 Since life imprisonment has not been defined by the law in Kenya, guideline 23.9 above which presumes a sentence specifying the length of time would not be applicable. However, in such cases, the court should endeavor to impose a sentence in keeping with the spirit of these guidelines as set out in part I.

27. In this particular case the only reason given for the 5-year sentence was the fact that the Probation Officer's Report was negative. The learned trial magistrate stated:

> 'the Probation Officer's report considered which is against the release of the accused on a non-custodial sentence on grounds among others that they could be flight risks and face rejection from the community desirous of lynching them over their criminal tendencies.

28 The reason above is the sole reason for the five-year sentence as per the record. There is nothing on record to show that the appellants were made aware of the very adverse rapport against them and had an opportunity to respond. But of great importance as to the rights of the appellant's to a fair hearing there is no consideration of the mitigation factors; that the appellants were first offenders; that they had pleaded guilty, that they had indeed offered restitution. Even where the 5 year imprisonment sentence for first offenders would have been justified there was reason to give reasons for rejecting what was in favour of the appellants.

29. The Guidelines came into force vide Gazette Notice No 2970 headed the Constitution of Kenya the *Judicial Service Act* (No 1 of 2011) Sentencing Guidelines The gazette notice states :

> These Sentencing Guidelines are a collaborative effort of the justice sector institutions under the auspices of the National Council on the Administration of Justice (NCAJ), a multi-sectoral body established under section 34 of the *Judicial Service Act*, 2011.
>
> The Guidelines have been developed pursuant to section 35(2) of the *Judicial Service Act* which mandates NCAJ to formulate policies relating to the administration of justice and to implement, monitor, evaluate and review strategies for the administration of justice. They are also made as part of State's duty under Article 21 of the *Constitution*. These Sentencing Guidelines are aimed at guiding judicial officers, in the application and interpretation

of laws that govern sentencing. They are a response to the challenges of sentencing in the administration of justice, which include disproportionate and unjustified dis parities in respect to sentences imposed to offenders who committed same offences in more or less similar circumstances; and an undue preference of custodial sentences in spite of the existence of numerous non-custodial options which are more suitable in some cases. Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders. While recognizing that sentencing is one of the most intricate aspects of the administration of trial justice, the Guidelines have collated the principles of law that should guide courts in the exercise of their discretion, so that sentences for analogous circumstances are delivered as transparently and consistently as practically possible. They are now presented as a one stop reference that judicial officers and other practitioners in the justice chain can use to guide their engagements with the courts on the matter of sentencing. Accordingly, the Guidelines are not intended to substitute the provisions of the *Constitution* and statutory laws regulating the administration of Justice. (emphasis added)

30. It goes without overemphasis that these Guidelines are considered the to go to good practice towards ensuring sentencing justice for all categories of offenders, victims and the community and the criminal justice system itself.

31. Both the learned trial magistrate, and the Probation officer were obligated to consider all the requisite factors and to place them on record.

32. As it is the appellants side of the matter was not considered and that is where this court comes in.

33. In the circumstances even though the appellants pleaded guilty the plea to count 1 was clearly not unequivocal in light of the defective charge.

34. The 1st accused however did admit to being found in possession of the complainant's panga, which is what led to the arrest in the first place. He is the one who mentioned the 2nd accused.

35. With respect to the alternative charge I find that the facts as given by the prosecution and admitted by the 1st accused person establish the alternative charge of handling stolen property c/s 322(2) of the penal code.

36. The 1st appellant's conviction with respect to the 1st count is quashed. However, it is substituted with a conviction on the alternative charge of handling stolen c/s 322 (2) property which was one panga. The penalty as provided (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

37. Taking into consideration the mitigating factors, and that there were no aggravating circumstances, I would find the five years' imprisonment as harsh and substitute for a term of three years' imprisonment from the date of arrest.

38. The rest of the appeal succeeds. The following orders issue

    i. The conviction on the main count is quashed and the related sentence is set aside.

    ii. The 1st appellant is guilty of the alternative charge. He is convicted of the same and sentenced to three years' imprisonment from the date of 1st remand, September 20, 2021.

    iii. The 2nd appellant be set at liberty unless otherwise legally held.

    iv. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH MAY 2023

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MUMBUA T MATHEKA

JUDGE